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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES P. PANTHER, Plaintiff and Appellant, v. STEVEN A. MICHELI, Defendant and Respondent.	D048047 (Super. Ct. No. GIC786149)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia A. Y. Cowett, Judge. Affirmed.

In this action, plaintiff James P. Panther seeks legal malpractice damages from his former attorney Steven A. Micheli, for alleged lost opportunities stemming from the outcome of certain underlying actions concerning a real estate development project which never came to fruition. The trial court granted Micheli's motion for summary judgment, which was based on arguments that plaintiff was unable to demonstrate, as to the legal

representation provided by Micheli, any triable issues of fact concerning any causation of any damages. (Code Civ. Proc., §§ 437c.) Plaintiff appeals.

We review the judgment and consider the arguments concerning the causation and damages issues on a de novo basis. (*Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1056-1057 (*Orrick*).) The trial court correctly determined Micheli was entitled to judgment as a matter of law, in the absence of triable issues of material fact, and we find no abuse of discretion in the evidentiary rulings. We affirm the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Introduction

Beginning in 1995, plaintiff and other participants (investors) were actively seeking to pursue a Carlsbad real estate project (referred to as the project or the real estate matter), through a real estate development financing transaction, involving security interests. Plaintiff alleges that he lost his multimillion dollar interest in the project when the Canadian defendants[1] wrongfully foreclosed upon him. Represented by Micheli and others, plaintiff obtained a preliminary injunction against the foreclosure, but it was set aside. The foreclosure was completed and plaintiff lost his 25 percent interest in the

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1 By "Canadian defendants," the parties are referring to the adversaries that Micheli, as a former attorney for plaintiff, was pursuing in the main underlying action (but allegedly unsuccessfully enough, as will be described). Chiefly, they are a Canadian trust known as Financial Asset Management Foundation (FAMF), a secured party which foreclosed upon land jointly owned by plaintiff and others, a related investment vehicle, Grain Development, LLC (Grain), and also individuals who participated in FAMF's management (William K. Park and Ken Tremblett).

project, and now claims that loss and others were based on (1) Micheli's representation in the foreclosure and subsequent trial proceedings, which resulted in a judgment against the chief Canadian defendant (FAMF) that was allegedly too small and too difficult to collect, or (2) the manner in which the then-legal advisers to the project (the firm Hecht, Solberg, Robinson, Goldberg & Bagley, LLP (legal advisers or Hecht Solberg); see pt. B., *post*) had originally structured and pursued it, or (3) the fact that Micheli advised him to settle with those legal advisers for too little money.

There have been a multitude of superior court and appellate and original proceedings in this court arising out of these disputes, after plaintiff lost his investment in the real estate matter. In order to more fully set forth the identity of the various parties, we quote from a prior opinion issued by this court in the first of the underlying actions on which this malpractice case is based, *Panther v. Park et al.* (July 16, 2003, D038066 [nonpub. opn.]) (our prior opinion):

"At issue in Panther's appeal are issues involving the financing of a contemplated development of Carlsbad real property (the Property) owned initially by Panther and Russell Grosse (Grosse).

"Wanting to develop their Property, Panther/Grosse obtained funds from business trust FAMF in return for a promissory note favoring FAMF secured by the Property (the FAMF note). Eventually, Panther and FAMF's trustees agreed to a joint venture and created CanAm Developments, LLC (CanAm) to receive the Property. Panther and Grosse each received a 25 percent membership interest in CanAm. The remaining 50 percent ownership interest in CanAm was held by Grain, an entity created by FAMF's

trustees to become a member of CanAm. As part of that transaction, Grain executed a promissory note to FAMF (the Grain note) secured by the membership interests in CanAm held by Grain and Panther/Grosse.

"Later, Park and Tremblett assumed management of FAMF and Grain. When Grain did not make interest payments to FAMF under the Grain note, FAMF noticed a default on the note. After FAMF gave Panther notice of its intent to sell his CanAm membership interest, Park and Tremblett began foreclosure proceedings on that interest. " (Fns. omitted.)

Everybody sued everybody else, as we next describe.

B. Underlying Actions

We next outline the three underlying actions which gave rise to this legal malpractice lawsuit against Micheli because, as alleged in the fourth amended complaint, plaintiff believes they constituted inadequate recoveries on his underlying claims. Although he also sued other attorney defendants on similar theories, only the summary judgment motion granted as to Micheli is before us now.[2]

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[2] The full names of the other attorney defendants in the subject complaint are Chapin, Fleming, McNitt, Shea & Carter and Mazzarella, Dunwoody & Caldarelli and Mark C. Mazzarella. Cross-complaints seeking attorney fees due were filed. Chapin obtained summary judgment, and there was a trial scheduled to begin as to Mazzarella in the fall of 2006.

1. Real property matter (first underlying action):

First, Panther sued FAMF, Park and others, including Tremblett and Grain.[3] (*Panther v. Park, supra,* D038066, our prior opinion). He alleged that his ownership interest in CanAm was wrongfully foreclosed upon by FAMF, a Canadian business trust, as creditor of CanAm. FAMF borrowed all the funds it loaned to CanAm from its parent Canadian company, FAMS, and FAMS held a security interest in assets of FAMF. Panther also brought breach of contract and related claims, alleging the defendants had conspired to eliminate him as a member of CanAm by wrongfully foreclosing on the encumbrance against his 25 percent ownership interest in CanAm and appropriating that ownership interest to the other owners' benefit. Panther also alleged defendants breached the implied covenant in certain contracts (CanAm's operating agreement, the Grain note, and the security agreement).

Represented by Micheli and others, plaintiff obtained a preliminary injunction against the foreclosure. However, it was set aside in July 1999, when the court that issued it found that Panther, as a minority owner, was misusing the injunctive relief in his negotiating efforts to buy out the Canadians. The court decided relief in damages would be adequate and set aside the injunction. Micheli amended the pleadings to further pursue damages theories. Complex securities issues were resolved about the relationship

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3 Panther's underlying complaint also named his former co-investors Grosse and CanAm as defendants. Grosse settled the case and allowed the Canadians to buy out his 25 percent interest, leaving Panther as a minority owner. However, those defendants were not parties in our prior opinion (No. D038066).

between FAMF and FAMS and the other Canadians. Eventually, the superior court granted summary adjudication favoring Park, Tremblett and Grain on Panther's claim for wrongful foreclosure, as they were not the secured parties (only FAMF).

In November 2000, the matter went to trial on the wrongful foreclosure theory against FAMF. Plaintiff presented expert evidence that his interest in the project would have been worth $8-$9 million at that time, if he had not lost it. As summarized in our prior opinion, the jury verdict awarded a lesser amount, finding that as a result of the wrongful foreclosure, Panther suffered loss or damage in the amount of $2,464,142 for the loss of his membership interest.[4] Judgment favoring Panther against FAMF was entered for $2,464,142 plus 10 percent annual interest. Although Panther attempted to have FAMS added as a judgment debtor on the basis that it was an alter ego of FAMF, his request was denied.

Panther appealed that judgment, seeking more prejudgment interest, and FAMF cross-appealed on unrelated matters. The judgment was upheld on appeal as modified to add further prejudgment interest to Panther. (Prior opinion, D038066.) The ruling granting summary adjudication to Park and Tremblett individually (and Grain), regarding the claim of wrongful foreclosure, was also upheld on appeal, and this court observed that due to the manner in which the case was presented at trial, effectively, Panther had been

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4 Additionally, the jury found FAMF breached the implied covenant and, as a result of that breach, Panther suffered loss or damage in the amount of $372,551, but the court ruled these damages were already included in the verdict. The jury found FAMF breached fiduciary duties it owed to Panther and constructively defrauded Panther but without any resulting loss or damages to Panther.

allowed to present tort and/or conversion-type theories against those individuals. (Prior opinion, D038066; see part III, *post*.)

Also, those prevailing parties, defendants Park, Tremblett and Grain (nonparties to the contracts) brought and won posttrial motions for attorney fees as the prevailing parties on Panther's contract-related claims, and those rulings were upheld on appeal. (Prior opinion, D038066.)[5] They pursued vigorous collection efforts against Panther's assets, which he resisted.

Even though Panther had obtained this judgment in his favor against FAMF, he encountered significant problems trying to collect it, because FAMF was in bankruptcy in California and in Canada, claiming that its assets were completely encumbered by obligations to FAMS, the parent company. It is not disputed that the difficulty in pursuing this bankruptcy litigation was a major factor in plaintiff's decision to enter into the allegedly inadequate global settlement with the Canadian defendants for $2.15 million, and he characterizes that settlement amount as one source of his current malpractice claim. We will further describe those events in the discussion portion of this opinion.

2. Legal malpractice (second underlying action):

Second, in February 2000, Panther sued the legal advisers who had structured the underlying real estate transaction, Hecht Solberg. He alleged that they committed legal

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[5] Further, in a separate appeal, FAMF sought to set aside the judgment on the ground Panther had obtained it by fraud, but the order denying its motion to vacate the judgment was affirmed. (*Panther v. FAMF* (Dec. 18, 2003, D041126) [nonpub. opn.].)

malpractice against him, by failing to obtain waivers of potential conflicts of interest among the various participants, and they otherwise breached their fiduciary duty obligations. (*Panther v. Hecht Solberg* (Super. Ct. San Diego County, 2000, No. GIC743628) (second underlying action).) Plaintiff asserted that he was damaged in the amount of approximately $4.5 million through the loss of the property, which had increased in value over the years. Plaintiff also contends that the San Diego real estate market could have again increased the value of the real property in the real estate matter, such that his lost opportunities would have been of greater financial magnitude.

Eventually, these legal advisers filed a motion for summary judgment in the second underlying action, raising the bar of the statute of limitations. Plaintiff contends that Micheli gave him bad advice about when the statute of limitations would run, resulting in the action being filed too late by another attorney, Dan Stanford. Plaintiff made a settlement offer of $695,000. Hecht Solberg was interested in settling as long as the amount was less than seven figures, due to a risk of duplicative recovery by plaintiff in this case within a case context.

After mediation and between March and May 2001, plaintiff settled this second underlying action for $950,000. In his fourth amended complaint, he alleges this was inadequate, because of the great value of his interest in the project that had been foreclosed upon (either 25 percent or 33 percent, if there had been an enforceable right of refusal from Grosse). On appeal, plaintiff disputes whether this portion of the settlements (with the legal advisers) may properly be considered in connection with his negligence

allegations against Micheli that he recovered insufficient sums in the underlying actions. We will discuss that issue further in part IIA, *post*.

3. Park action (third underlying action):

Third, plaintiff brought a related defamation case against Park individually, and now claims in his fourth amended complaint that he recovered inadequate amounts on it, which should be attributable to legal malpractice by Micheli. (*Panther v. Park* (dism. Jan. 30, 2003, D039601).) This litigation included a hardfought attorney disqualification battle leading to many attorney fees obligations on both sides. Plaintiff's effort to disqualify one of the defense counsel was unsuccessful, and the appeal was dismissed. However, the briefs on appeal do not address this separate related action in any meaningful way and we need not further consider it. Accordingly, this appeal only addresses Micheli's role regarding the two main underlying actions.

4. Settlements reached:

As already described, the legal advisers settled with plaintiff in 2001. Next, although the damages judgment in the first underlying case against FAMF was upheld on appeal in July 2003, and interest was accruing, Panther was still litigating the collectibility of the judgment in California and Canadian bankruptcy courts. Eventually, in January 2004, all pending actions arising out of the real estate matter were resolved in a global settlement. The parties agreed to "settle fully and finally all existing and potential litigation, [c]laims and [c]osts, . . . and to provide for mutual general releases." As part of the settlement, FAMF, Park, CanAm and related individuals and entities agreed to pay Panther $2.15 million in full satisfaction of all claims by Panther, and

Panther agreed to abandon his appeal in the related defamation case. The parties further agreed to dismiss several additional pending litigation matters and to release collateral that Panther had encumbered to secure the injunction that was eventually set aside. This settlement was reached in part because of the bankruptcy litigation concerning FAMF, and in part because plaintiff received advice from two attorneys other than Micheli that the settlement was prudent. Panther did not want to pay attorney fees owed to Park and Tremblett. Also, at that time, Panther and family wanted an end to the litigation.

C

Current Action

In April 2002, plaintiff sued Micheli and other attorney defendants in the instant action, on the basis that the legal representation he received from 1999-on was negligent, particularly with respect to the first underlying action in the real estate matter. As amended, plaintiff's complaint against Micheli is pled in terms of negligence and breach of fiduciary duty. Although he originally sought to add a breach of contract cause of action, a demurrer by Micheli was sustained without leave to amend, and that ruling is not challenged on appeal. (The court ruled that it could not be determined how an oral contract with Micheli was different from the obligations purportedly contained in the written contract between plaintiff and the Chapin firm; also, the written contracts indicated Micheli signed as agent for the law firms, not individually.)

The other attorney defendants with whom Micheli was formerly associated, the Chapin firm and his current firm, Mazzarella, were also sued for their participation in obtaining the separate settlement for Panther in the legal malpractice action arising from

the real estate matter. The Chapin firm obtained summary adjudication, which is not before us. The record does not indicate any outcome regarding the scheduled trial of the claims against or cross-complaints by the remaining Mazzarella defendants (fall 2006), and we are only dealing with the summary judgment Micheli obtained.

According to the fourth amended complaint, the settlements plaintiff reached through Micheli's conduct were inadequate, and damaged him in the following ways. As to underlying action number one, plaintiff alleged: "As a legal consequence of these and other negligent acts, Plaintiff was precluded from maintaining his ownership and investment interests, pursuing claims which would have increased his recovery, was precluded from an opportunity to be made whole for the acts committed against him by FAMF and FAMS, preventing him from collecting on the damages awarded to him through the courts, was forced to incur legal and other expenses far in excess of what was fair and appropriate, incurred liability by way of judgment to other parties, and was required to ultimately resolve his dispute with the FAM entities at a severe discount from its original value. Plaintiff has thus incurred loss and damage to his personal savings, anticipated profits, expenditure of attorney's fees, expenses and equity value in CanAm, other business ventures and investments, and his personal income in an amount which shall be proven at trial."

Additionally, plaintiff claims that it was Micheli's legal malpractice that caused him to lose his injunctive relief, which would have preserved his minority ownership interest. In the alternative, he claims that even in light of the loss of the injunction, Micheli did not plead the correct causes of action and thereby "substantially lessened the

actual and potential damage award to which Plaintiff would otherwise have been entitled." Plaintiff further alleges that Micheli should have sued additional parties in the underlying action, including FAMS and Hecht Solberg.

With respect to underlying action number two, plaintiff contends that his 2001 settlement with those legal advisers, on Micheli's advice, was "premature, insufficient and ill-advised" and was for an amount smaller than the actual value of the case would have been, but for the deficiency caused by the statute of limitations defense. Accordingly, plaintiff claims that he was substantially damaged as the result of the premature settlement, and that Micheli caused this damage (much more than the $950,000 received in settlement). This would allegedly have included "damages for attorney's fees, lost profits, lost investment opportunities and other damages, irrespective of the lack of legal responsibility of the Canadians for such losses."

D

Summary Judgment Motion, Opposition

Micheli filed a motion for summary judgment on the ground that he was entitled to prevail because plaintiff could not show that any actions or inactions by Micheli were a causative factor of any of the alleged losses. He also filed related summary adjudication motions seeking to establish a lack of damages caused as to various named defendants in the underlying cases. Micheli argued that plaintiff's claims about lost profits and also lost opportunities to recover more in damages were based only on speculation. For example, plaintiff had previously admitted that he thought the Canadians were crooks and he did not want to work with them, but rather to buy them out, so the success of the underlying

development project was by no means assured, even if the injunction had remained in place. The project was financially distressed at various times, and undeveloped through 2000, and the real estate market was unpredictable.

Micheli therefore contended that even if the court assumed some breaches of the applicable standard of care had taken place in his professional actions, it was nevertheless too speculative to assume that Panther would have obtained any better results than were represented by the settlements with the Canadian defendants and the legal advisers. His declaration stated an attorney for FAMS told him in 2001-2002 that FAMS planned to join FAMF in bankruptcy, if FAMS were added to the judgment. Micheli's showing included 93 lodged documents and requests for judicial notice, largely consisting of the pleadings, declarations and minutes in the underlying cases, together with a history of the difficulties in collecting the judgment against FAMF.

Portions of plaintiff's deposition were attached to the separate statement, showing that he entered into the global settlement on the advice of two attorneys other than Micheli, including Canadian attorney Robert Millar, that settling was the prudent course, because the Canadians were not thought to be likely to pay more to settle the various claims. Deposition testimony by Millar and Micheli was submitted to the same effect. Also, substantial attorney fees had been assessed against plaintiff, leading to collection efforts against him, so the settlement also was entered into so he could avoid losing his assets in that manner. Plaintiff was motivated to settle with the legal advisers in 2001, not only because of the statute of limitations issue, but also because his then-attorney, Dan Stanford, thought it was a good settlement.

In response, plaintiff first argued that he could prove he lost his interest in the project as a result of Micheli's breach of duties, and that the lost injunction was a major cause of this damage. He also contended that Micheli was negligent in not substituting enough viable alternative theories of recovery against the correct defendants, or by failing to name additional defendants (such as FAMS), so as to recover a larger judgment or a collectible one. He submitted his own extensive declaration and argued that he could have obtained better results, if not for this negligent conduct by Micheli. For example, he stated that Micheli should have more vigorously litigated his claims he should have been entitled to a right of first refusal at the time that his former co-investor Grosse sold his interest to FAMF, and that this would have raised Panther's share from 25 percent to one third, again leading to a larger potential verdict below. (However, the court sustained evidentiary objections to this effort to prove damages in Panther's declaration.)

Similarly, if the underlying judgment had named FAMS as well as FAMF as a defendant, plaintiff claims he would have been more likely to be able to collect it. Further, he states that Micheli admitted to him that he should have obtained a damages award against Park or Tremblett individually, but the jury must have become confused about the breach of fiduciary duty claims against them. (However, the court sustained evidentiary objections to this effort to prove damages in Panther's declaration.) Plaintiff then states that the various matters involving the Canadians also included whether and how the legal advisers, Hecht Solberg, should be involved, and Micheli was the principal counsel to coordinate those matters.

In addition, plaintiff provided declarations by legal experts, including Millar, his Canadian attorney, who gave an opinion that Park and Tremblett would have been able to satisfy a judgment in their capacities as agents or trustees of FAMF, based on Canadian law and the bankruptcy proceedings. Millar also gave the opinion that recovery against FAMS in the underlying action would have increased the likelihood of collection of the judgment. Plaintiff's expert economist, Nevin, stated that based on the upsurge in value of property in San Diego County after the year 2000, plaintiff's originally estimated/ approximate $8 million potential loss as of the year 2000 would now have to be considered to be a much greater loss of the net profitability of the development project, up to $20 million. (However, it should be noted here that the jury had awarded $2.4 million for the wrongful foreclosure, not the $8 million Nevin had previously estimated.)

In reply, Micheli argued that plaintiff had failed to respond to his showing that plaintiff would probably have been unable to collect anything on the judgment, or that the Canadian defendants would not have paid more in settlement than they did. Micheli also referred to the undisputed facts that the underlying real estate project was financially distressed and not shown to be a likely source of huge profits, and the original co-venturers, the Canadians, would not deal with Panther, even while the injunction was pending. It was undisputed that FAMF was in bankruptcy and that FAMS had threatened bankruptcy. Micheli argued that plaintiff had not been able to prove that a better result was certain, absent any legal malpractice, or that collection of a greater award or settlement would have been likely. Also, evidentiary objections were raised by Micheli to portions of Panther's declaration, as improperly offering expert opinion from a lay

witness, even though Panther was himself an attorney and investor. Also, those declaration statements were made without adequate foundation as to personal knowledge, and hearsay objections were raised.

In another reply, plaintiff objected to portions of Micheli's reply materials, on the basis that they raised arguments that really belonged in the moving papers.

E

Ruling

Following oral argument, the court took the matter under submission. The court issued orders of December 21, 2005 and January 4, 2006, granting Micheli's motion for summary judgment and ruling upon Micheli's evidentiary objections. These were granted in large part as to Panther's declaration, but overruled as to the expert declarations.

The court granted the motion, explaining its reasoning that plaintiff had failed to raise any triable issues of fact, on whether "Mr. Micheli's handling of any of Mr. Panther's litigation was a but for cause of any damage Mr. Panther may have suffered. 'A plaintiff in a legal malpractice action must still show a causal relationship between the legal malpractice and some "actual loss or damage" to prevail.' [Citation.] The Court in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242, stated, 'In both litigation and transactional malpractice cases, the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent.' "

The trial court also relied on *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461 (*Barnard*), as follows:

> "It is not enough for Barnard to simply claim, as he did at the trial of this malpractice action, that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages. ' "Damages to be subject to a proper award must be such as follows the act complained of as a legal certainty." ' "

The trial court accordingly concluded "plaintiff has not met his burden to show there is a triable issue of material fact regarding a legal certainty that plaintiff would have had a better result but for Micheli's alleged negligence." Rather, there was no evidence suggesting that plaintiff would have recovered more at a trial than he received in settlement of any of his claims. Accordingly, "defendant met his burden to show that Panther's causes of action have no merit as against him because there is no causation. Plaintiff has not met his burden to show a triable issue of material fact exists as to causation." The related summary adjudication motions were deemed moot in light of the above ruling.

Judgment was entered accordingly and plaintiff appeals. We have received a judicial notice request from plaintiff containing a declaration from his Canadian attorney Millar on potential indemnity rights that Park may have had, based on Canadian trust and corporate law, with attached authorities on which he relied. We address that request in part I, *post.*

DISCUSSION

I

PRELIMINARY PROCEDURAL STATEMENT

To prevail in a motion for summary judgment, defendant must bear a burden of persuasion "that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.] . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

On review of the order granting summary judgment, the appellate court follows the same procedure as did the trial court: "We identify the issues framed by the pleadings, determine whether the moving party has negated the nonmoving party's claims, and determine whether the opposition has demonstrated the existence of a triable issue of material fact. [Citation.]" (*Orrick, supra,* 107 Cal.App.4th 1052, 1056-1057.) Summary judgment is proper if no triable issue of fact is shown by all the papers submitted, such that the moving party is entitled to judgment as a matter of law. (*Ibid.*)

Plaintiff raises several procedural objections on appeal. First, he contends there are due process concerns because the trial court did not follow an appropriate method in

ruling on portions of the summary judgment motion. He argues the showing made by Micheli in the moving papers was incomplete and was only bolstered by the reply papers, and he claims this was too little, too late. Also, at the hearing, he argues the trial court did not adequately explain its reasoning process about burden-shifting in the summary judgment context. However, the court took the matter under submission and issued rulings and a judgment, and it is their correctness which we review, not the trial court's reasoning. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) We will return to this objection in part IIIC, *post.*

In a request filed in this court while the appeal was pending, plaintiff asked us to take judicial notice of certain authorities and his Canadian attorney's statements regarding the applicability of Canadian law to these facts, both as they exist and hypothetically, for purposes of analyzing malpractice liability. (Evid. Code, §§ 452, 459.) This request, made in connection with the reply briefing, seeks to support plaintiff's arguments that more recovery could have been obtained from the Canadian defendants, particularly Park, if they had been properly pursued by Micheli, on several alternative liability or indemnity theories. Plaintiff submits a "statement" from his Canadian attorney, Millar, who sets forth his views and applicable authorities and treatise excerpts about potential indemnity sources for Park regarding FAMF and FAMS, on trusteeship or corporate law theories. Plaintiff argues such monetary sources could conceivably have been made available, through proper legal representation, to supplement or exceed the recovery he gained in the underlying judgment and then the settlements.

In opposition, Micheli argues that this request should be denied because Attorney Millar has been involved with plaintiff's case at the trial level since 2001, and he is not an objective expert on Canadian and British Columbia trust and corporate law. Also, he addresses only hypothetical situations about judgments that could have been obtained against Park for damages, or against Park as an agent for FAMS, and therefore the statement and the treatise materials attached are not proper materials for judicial notice. Instead, they are new evidence and opinions that were not before the trial court.

This judicial notice request must be denied. We may resolve only those issues of law actually presented and properly reviewable de novo on appeal, and it would be speculative to apply newly submitted arguments about foreign law in this summary judgment context. The trial court had a different declaration from Millar on similar issues before it, and it was discussed at oral argument. Plaintiff had the opportunity to submit such authorities and arguments at that time. At this point in the proceedings, we do not resolve factual disputes, and even if we were to take notice as requested, we would not do so outside of the record or to establish the truth of the material contained within the submitted documents, as that is not our function on appeal. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065; *Vons Companies, Inc. v. Seabest Foods Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

Plaintiff next contends the trial court did not give the proper weight to his declaration, by sustaining evidentiary objections that were overly technical, without giving him an opportunity to cure such defects, and the court failed to adequately specify the evidence it relied upon in the ruling. (Code Civ. Proc., § 437c, subd. (g); but see *Soto*

v. State of California (1997) 56 Cal.App.4th 196, 199 [a failure to state reasons is harmless error if de novo review establishes the validity of the judgment].) We note that the court had before it plaintiff's objection to the reply papers, claiming he was prevented from curing any evidentiary mistakes, but this did not explain what he would have done differently. This unorthodox objection was overruled.

In *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694, the appellate court noted that even though ordinarily, an appellate court reviews a summary judgment motion "de novo," a different analysis will apply for review of a trial court's rulings on evidentiary objections. Thus, "an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]" (*Ibid.*) Even where an appellant disagrees with the rulings made, reversal is not required if they are not shown to be incorrect. " 'Anyone who seeks on appeal to predicate a reversal of [a judgment] on error must show that it was prejudicial. [Citation.]' [Citation.]" (*Ibid.*)

We will further address plaintiff's evidentiary contentions in discussing the merits of the parties' respective showings, under this prejudice analysis. (Pt. IIIC, *post*.) We are aware that Micheli is complaining that plaintiff did not make an accurate summary of the facts on appeal and his arguments should therefore be deemed waived for lack of proper briefing. (*Pringle v. La Chappelle* (1999) 73 Cal.App.4th 1000, 1003.) However, the de novo nature of our review of this summary judgment weighs in favor of an approach in which we consider the merits of the respective positions, and the arguments and issues are adequately presented for those purposes. We next turn to the existing record to

determine whether the summary judgment represents an appropriate resolution of the causation and damages issues.

II

CAUSATION AND DAMAGES PRINCIPLES

A. Introduction

To recover against Micheli, plaintiff must prove each of the elements of his causes of action for professional negligence: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.)

The parties essentially agree that for purposes of this appeal, we may assume arguendo that triable issues may exist concerning whether Micheli's legal representation met the applicable professional standard of care. Our focus must be upon the remaining elements of a negligence claim, causation and damage, and particularly in this settlement context.

We also note that on appeal, plaintiff contends that the portion of the settlements reflecting recovery of $950,000 from the legal advisers, Hecht Solberg, should not be considered to determine causation questions regarding the malpractice allegations against Micheli. However, plaintiff's fourth amended complaint clearly presented that issue to the trial court, as part of the causation of damages determination, and his declaration in opposition to the summary judgment motion also stated that the various matters involving

the Canadians had included considerations about whether and how Hecht Solberg should be involved, and Micheli was the principal counsel to coordinate those matters. Both amounts of settlement proceeds should accordingly be considered regarding the causation and damages questions on appeal.

B. Guidelines

Although a plaintiff alleging legal malpractice is not required to offer proof that establishes causation "with absolute certainty," the plaintiff must " ' "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." ' [Citations.] In any event, difficulties of proof cannot justify imposing liability for injuries that the attorney could not have prevented by performing according to the required standard of care. [Citation.]" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242-1243 (*Viner*).) "In the legal malpractice context, the elements of causation and damage are particularly closely linked. . . . The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney's negligence, and that such a loss was measurable in damages." (*Hecht Solberg et al. v. Superior Court* (2006) 137 Cal.App.4th 579, 591.)

In *Viner*, the court applied the same causation standards to both litigation and transactional malpractice actions. Here, plaintiff is alleging negligence as to both the litigation of the underlying case and the transactional aspects of the settlements. In either case, he must "establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has

been in use for more than 120 years, is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice." (*Viner, supra*, 30 Cal.4th 1232, 1241.)

In *Orrick, supra*, 107 Cal.App.4th 1052, the court allowed a plaintiff to proceed in an action for legal malpractice against former counsel, but only on contract claims, since no evidence of tort damages had been produced that resulted from the alleged malpractice in reaching a marital settlement (no showing that but for the negligence of the attorney, a better result could have been obtained). The plaintiff did not provide any evidence that his former wife would have settled for less nor that a trial would have resulted in a more favorable judgment than the settlement, if the attorney had not been allegedly negligent in settling the case. However, the court noted that some authorities have recognized that fees paid to a second attorney to correct the first attorney's error may be characterized as tort damages, on a "tort of another" theory. (*Id*. at p. 1061, fn. 5.) However, the "tort of another" theory was not properly presented in the *Orrick* case. (*Ibid*.)

Courts have recognized the difficulty in showing more than speculative harm from the nature of legal representation in a particular case in which settlements were reached, due to "the myriad of variables that affect settlements . . . ." (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663.) In that case, the court found the plaintiff had failed to demonstrate that but for the attorney defendants' delay in processing the case, the plaintiff's underlying case "would have settled at all, let alone at an earlier date, for the same amount, or with the same structure." (*Ibid.*) The court applied the standard that

" '[d]amage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . . .' [Citation.]" (*Ibid.*) Further: " '[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. [Citations.]' [Citations.]" (*Ibid*.)

In *Jalali v. Root* (2003) 109 Cal.App.4th 1768, the court identified some of the various uncertainties avoided when a case is settled: rulings by a trial judge that might set aside a verdict or grant new trial, or rulings by an appellate court that the judgment was unsupported, and in addition, the general avoidance of problems encountered in collecting on the judgment, such as a defendant's bankruptcy. (*Id.* at p. 1771.) (Of course, this plaintiff did not avoid the latter problem as to defendant FAMF.) The court in that case reversed a jury verdict for plaintiff in a malpractice action against her former counsel, who had settled her case. She failed to prove damages were caused by counsel's inaccurate advice, or that she could have received a greater jury award, or that she would have sought a larger or a different settlement if she had received different advice. (*Id.* at pp. 1777-1778; see 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 334, pp. 116-120.)

Likewise, in *Barnard, supra*, 109 Cal.App.4th 1453, the court analyzed a plaintiff's claim that his attorney's negligence caused him to settle for too little money or on different terms. The court found a grant of nonsuit was appropriate, because the plaintiff had only submitted evidence of speculative harm and could not show that, but for defendant counsel's negligence, the underlying action would have resulted in a better

outcome than was represented by a negotiated settlement. The court characterized this as a "settle and sue" case (*id.* at p. 1461, fn. 12), and required that the plaintiffs present more than "a wish list of damages, unsupported by evidence that the [defense] would have settled for more, or by expert testimony to show that Barnard's amounts could have been recovered had the case been tried, or by evidence (even from Barnard's own mouth) to say that he would have gone through with the trial (which would require him to do more than just say that, in spite of his serious financial problems, he could have paid the costs involved in a trial). In short, there is no evidence to even suggest that, had Barnard gone to trial or insisted on a different settlement, he would have recovered more than he received in settlement." (*Id.* at p. 1463, fn. omitted.)

In *Barnard, supra,* 109 Cal.App.4th 1453, the court included a footnote that discussed the views of specialists in the legal malpractice field, and pointed out that hindsight challenges to recommended settlements can be speculative. Such settlement recommendations " 'often are protected as judgment calls. In evaluating and recommending a settlement, the attorney has broad discretion and is not liable for a mere error of judgment. The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.' " (*Barnard, supra,* 109 Cal.App.4th at p. 1463, fn. 13.)

In *Viner*, the court clarified that circumstantial evidence may be provided to satisfy the burden of showing a better result should have been obtained, but for the claimed negligence: "An express concession by the other parties to the negotiation that

they would have accepted other or additional terms is not necessary." (*Viner, supra*, 30 Cal.4th 1232, 1242-1243.)

In light of these criteria, we next analyze whether plaintiff is correct that the trial court erroneously failed to recognize that triable issues of fact remained regarding causation of his losses from the alleged legal malpractice, and regarding damages that arose in various categories.

III

APPLICATION

We address the causation of damages questions separately as to the two underlying actions, and then turn to the remaining evidentiary arguments.

A. Issues Regarding Losses in First Underlying Action

Plaintiff seeks to show that Micheli caused his losses in two main categories in the first underlying case. First, he points to the loss of his 25 percent interest in the project, which he attributes to the loss of the injunction that protected it against foreclosure temporarily, or to Micheli's failure to plead and prove sufficient theories against the Canadian defendants, such as conversion.

Second, he argues that due to Micheli's alleged failure to sue the correct or additional defendants on the correct or additional theories, he recovered a smaller judgment than warranted ($2.4 million, plus interest), and he was also unable to preserve his claims to a larger 33 1/3 percent share in the project (based on a right of first refusal to purchase Grosse's interest). Thirdly, he claims that the $2.15 million settlement was entered into only because the true judgment was uncollectible, even though it would

ultimately have been worth $4.5 million with interest, again due to Micheli's failure to sue the correct parties on the correct theories (other than FAMF).

Although plaintiff does not believe that the Hecht Solberg $950,000 settlement should be credited toward his ultimate recovery, for purposes of analyzing his potential malpractice damages, we have already stated that Micheli is entitled to argue that these matters were inextricably interrelated, based on the pleadings and the evidence. We therefore inquire whether plaintiff has demonstrated he is entitled to go to trial to recover additional amounts over the $3.1 million aggregate total of those settlements, in the form of malpractice damages from Micheli.

We will first address the arguments about the lost property interest in the project, and then the lost/inadequate/uncollectible judgment for damages.

1. Loss of Property Interest: The Injunction; Actual Profits

Plaintiff claims it was Micheli's legal malpractice that caused him to lose his injunctive relief, which would have preserved his minority ownership interest. The preliminary injunction against the foreclosure was set aside in July 1999, when the court ruled relief in damages would be adequate. At that time, Panther, as a minority owner, was attempting to buy out the Canadians, for varying amounts, which was not a preservation of the status quo. The question now is whether the manner in which Micheli litigated the underlying injunction and trial was reasonably likely to directly cause plaintiff damage, in the form of the loss of the property interest and the actual profits that would have resulted from its realization.

The standard which must be met to defeat the summary judgment motion did not require plaintiff to offer proof establishing causation of this loss "with absolute certainty." (*Viner, supra*, 30 Cal.4th 1232, 1242-1243.) However, the plaintiff must " ' "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." ' [Citations.] In any event, difficulties of proof cannot justify imposing liability for injuries that the attorney could not have prevented by performing according to the required standard of care. [Citation.]" (*Ibid*.)

The record on this point does not support plaintiff's contention that it was reasonably probable he would have retained his interest in the development project, absent any legal malpractice as alleged, either with respect to the injunction or the manner in which the trial was conducted. For example, plaintiff did not want to work with his adversaries the Canadians, but rather wanted to buy their majority interest, which would have been difficult to value or accomplish, and the project was financially distressed on an ongoing basis. He argues that Micheli should have done more to defend him against their claims that he was misusing the injunction in his negotiating process. However, the trial court at that time could have appropriately balanced the equities to decide to dissolve the injunction, on other grounds, even without any legal malpractice being part of the equation.

Plaintiff submitted a declaration from his legal expert, Kammar, opining that better representation or different legal theories could have prevented this loss. However,

expert opinion to resolve causation questions is not probative in legal malpractice actions. (*Piscitelli v. Freidenberg* (2001) 87 Cal.App.4th 953, 970-974 (*Piscitelli*).)

Although plaintiff's economist Nevin supplied evidence in 2000 that this property interest should have been worth $8 million, the jury awarded only $2.4 million for the loss of it. It is not conclusive proof that this verdict was wrong that Nevin now suggests that the property interest would have been worth $20 million today, if it still existed. Property development projects are subject to many variables and uncertainties from start to finish, and when they are subject to financial difficulties and infighting among stakeholders at early stages of the development, their prospects for financial success can only be described as speculative. Micheli presented sufficient undisputed facts about the major difficulties inherent in this development project, in order to shift the burden to plaintiff, to make a showing of more than speculative success. Thus, the record does not support plaintiff's claims that this interest was predominantly lost through legal malpractice, rather than through other factors in operation over the years 1995-2000.

2. Loss of Damages Entitlements Against Various Defendants: Conversion, Right of First Refusal Claim, and Problems With Collection Efforts (Settlement)

We first discuss plaintiff's arguments that different causes of action should have been pled against additional defendants. He contends that even in light of the loss of the injunction, Micheli's choices of the alternative causes of action pled "substantially lessened the actual and potential damage award to which Plaintiff would otherwise have been entitled," and Micheli should have sued additional parties in the underlying action, including FAMS and Hecht Solberg. As to Park and Tremblett, he argues that he would

have been more successful if conversion had been directly alleged against them, as opposed to his previous claims. He believes that those individuals might have been entitled to indemnity from FAMS or FAMF, such that more damages would have been available or collectible, despite the FAMF bankruptcy problems.

One theory of liability pursued by plaintiff on appeal is that fees paid to a second attorney to correct a first attorney's error may be characterized as tort damages, on a "tort of another" theory. (*Orrick, supra*, 107 Cal.App.4th 1052, 1061, fn. 5.) This could include fees paid to his own attorneys to pursue the Canadian defendants in bankruptcy court and postjudgment efforts to collect, and his own efforts to avoid paying Park's attorney fees.

Additionally, he seeks malpractice damages for the amounts he might have recovered against FAMS, Park, or Tremblett, assuming the global settlement had not been reached and/or was inadequate. This raises several issues to be addressed: the proposed conversion theory against the individual Canadian defendants; any potential theory against FAMS, the parent of FAMF; and the effect of the settlement reached when collection efforts were unsuccessful (based on FAMF being in bankruptcy in California and in Canada, and its claim that its assets were wholly encumbered by obligations to FAMS).

First, with regard to the conversion proposal, our prior opinion in the underlying case, D038066, considered that issue and rejected plaintiff's request to set aside the ruling that only FAMF should be liable for wrongful foreclosure. We concluded that based on the manner in which plaintiff sought to prove tort damages against the Canadian

defendants, effectively, he had already argued tort theories against the other Canadian defendants, such as Park, Tremblett, and Grain, and the judgment in their favor was upheld. We explained: "In sum, the record indicates the court effectively permitted Panther to proceed to trial against the moving defendants [Park, Tremblett, and Grain] on his theories that they tortiously foreclosed his ownership interest in CanAm and conspired to deprive him of such interest. Later, Panther's claims against those defendants for breach of fiduciary duty and constructive fraud were, in fact, litigated to the jury. By special verdict the jury found Grain did not breach fiduciary duties it owed to Panther or constructively defraud Panther. Further, although finding Park and Tremblett breached fiduciary duties they owed to Panther and constructively defrauded Panther, the jury also found Panther did not suffer any loss or damages as a result of those defendants' breach of fiduciary duties or constructive fraud. Hence, on this record Panther cannot show a reasonable likelihood that a result more favorable to Panther on his wrongful foreclosure claim against the moving defendants would have ultimately resulted absent the court's assertedly erroneous grant of summary adjudication favoring those defendants on such claim." (Prior opinion, D038066.)

We are obligated to adhere to that reasoning and can find no reasonable probability that any foreseeably likely recovery was denied to plaintiff because of the manner in which Micheli litigated the tort theories.

To the extent plaintiff submits his Canadian legal expert's declaration to show individualized recovery against Park would have been available since he was a trust and

corporate official for FAMS and FAMF, the expert declaration is not probative on causation. (*Piscitelli, supra,* 87 Cal.App.4th at pp. 970-974.)

Similarly, plaintiff's theory that he should have been entitled to obtain Grosse's interest, due to a right of first refusal in the operating agreement for CanAm, was presented in the underlying action. However, the trial court there rejected that claim and decided that the security agreement between Grosse and FAMF was more senior, and plaintiff could not pursue the Grosse interest. Plaintiff raises only speculation that he could have obtained a higher judgment against FAMF, the remaining owner of CanAm after the foreclosure, if no legal malpractice had been committed by Micheli. Even though circumstantial evidence may be enough to satisfy the burden of showing a better result should have been obtained by an attorney in an underlying case (but for negligence), the circumstantial evidence of the conditions existing at the time of this litigation and settlement does not support a conclusion that more money was most likely available to plaintiff. (*Viner, supra,* 30 Cal.4th at pp. 1242-1243.) The evidence was consistent that the underlying real estate project was financially distressed and not shown to be highly profitable at any stage, so as to render plaintiff's interest in any amount hypothetically more valuable. Micheli made a prima facie showing that any of plaintiff's losses in this respect were not caused by Micheli's actions or inactions.

Secondly, plaintiff complains that Micheli did not pursue any potential theory against FAMS, the parent of FAMF, until the end of the case, when alter ego claims were alleged but rejected. Alter ego issues were litigated in the bankruptcy court. However, the record shows that FAMF and FAMS maintained their separate identities and plaintiff

can show only speculation that FAMS could have been successfully pursued in this action, on an agency theory or otherwise. Micheli told him FAMS was threatening to join FAMF in bankruptcy if added to the judgment.

Finally, the effect of the settlement reached when collection efforts were unsuccessful must be considered with respect to these causation claims. In *Thompson v. Halvonik, supra*, 36 Cal.App.4th 657 at page 663, the court discussed the many variables involved in a decision to settle an underlying case, in light of ordinary causation rules, and found that particular plaintiff was only able to claim a mere probability that a different result would have occurred if the then-attorney had acted differently in the settlement process: " 'Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . . .' [Citation.]" (*Ibid.*) Further: " '[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. [Citations.]' " (*Ibid.*) In *Thompson,* such a showing was insufficient to support the malpractice claim. (*Id.* at p. 664.)

Here, too, plaintiff submitted evidence of speculative harm and could not show that, but for Micheli's negligence, the underlying action would have resulted in a better outcome than was represented by the negotiated global settlement, when considered together with the Hecht Solberg settlement. " 'The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.' " (*Barnard, supra*, 109

Cal.App.4th at p. 1463.) This settlement was reached after lengthy litigation about the respective roles of FAMF, FAMS, Park, and others, and this record does not justify or compel a reevaluation of those settlement variables now, for causation purposes.

In these summary judgment proceedings, the trial court properly determined that Micheli, as the moving party, had brought forward sufficient evidence to make a prima facie showing that there was no evidence to suggest that plaintiff would have recovered more than he received in settlement, if the legal representation had been different. Plaintiff, as the opposing party, was required to demonstrate the existence of triable issues of material fact on causation and resulting damage. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th 826, 850-851.) The speculative and hypothetical evidence plaintiff provided was insufficient to meet his burden.

B. Issues Regarding Losses in Second Underlying Action

Plaintiff next contends that he could have recovered more from the legal advisers, Hecht Solberg, on the grounds that they allowed or assisted in the wrongful foreclosure proceedings by FAMF. Micheli was alleged to be negligent not only by missing the statute of limitations in advising that plaintiff file a separate action against them, but also in failing to pursue them earlier in the underlying action. The settlement in May 2001, for $950,000, was reached after plaintiff previously offered $695,000. He alleges this settlement was nevertheless inadequate, because of the large value of his interest in the project that had been lost through foreclosure, and he seeks to have Micheli pay the difference because of his breaches of duty.

In his summary judgment papers, Micheli cited evidence that this settlement was reached after plaintiff made a settlement offer of $695,000, and Hecht Solberg attorneys had refused to consider a seven figure settlement, because they believed they should not be required to duplicate any recovery that could be obtained against FAMF. Plaintiff's negotiating attorney at the time, Dan Stanford, believed that the $950,000 settlement was favorable enough to plaintiff and no issues regarding Hecht Solberg were left on the table.

Again, the authorities are clear that the appropriateness of a settlement should be analyzed in hindsight with due respect for the variables that went into it, such as unpredictable trial or appellate court rulings, availability of evidence, or potential success at trial, or cost-benefit analysis of going to trial as opposed to settling. (*Barnard, supra,* 109 Cal.App.4th at pp. 1461-1463; *Jalali, supra,* 109 Cal.App.4th at p. 1771.) This settlement was reached through negotiation, mediation, and before any ruling had been made on the statute of limitations defense, and after negotiations. All those variables tend to support a conclusion that the settlement was an accurate assessment of potential liability, such that no remaining questions exist on causation of injury based on the part that Micheli played in it.

In light of these principles, plaintiff did not successfully demonstrate that the summary judgment motion and showing regarding causation were faulty. Rather, we agree with the trial court that plaintiff did not produce evidence to justify a finding of triable issues of fact about whether, without any legal malpractice occurring, plaintiff would have recovered more at trial than he received in settlement of any of his claims.

Nor does the record as a whole support a conclusion that causation questions remain about damages, based on any argument these settlements were inadequate in light of all the variables and circumstances.

C. Evidentiary and Procedural Issues

The trial court sustained various objections to plaintiff's declaration, for lack of foundation, hearsay, and unqualified expert opinion. Plaintiff contends that was error, because his declaration was an appropriate attempt to explain his understanding of the operating agreement for the underlying real estate project, and he also sought to demonstrate what he would have done under different circumstances regarding settlement of the cases. However, he does not show how those factual contentions were essential to his case, such that evidentiary errors, if any, could be considered to be prejudicial in light of the entire record.

Similarly, although the trial court referred at oral argument to the type of evidence which plaintiff could have but did not provide about what larger recovery was probable, we disagree with plaintiff that the court was inappropriately requiring specific declarations or admissions from the adverse parties that the Canadians would have paid him more. (See *Viner, supra,* 30 Cal.4th at pp. 1242-1243.) Rather, the court was discussing the causation proof issues in light of the appropriate criteria discussed by case law, such as *Barnard, supra,* 109 Cal.App.4th 1453.

On appeal of summary judgment, " 'we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citations.]' [Citations.]" (*Smith v. Wells*

Fargo Bank, N.A. (2005) 135 Cal.App.4th 1463, 1472, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) The trial court issued tentative and formalized rulings which adequately dealt with the evidentiary objections and the substantive issues, and the lengthy and analytical nature of the order shows that the trial court appropriately considered and reached the merits of the respective showings. This comprehensive record discloses that plaintiff was afforded a full and fair hearing, with sufficient opportunities to file opposition and make oral argument. The trial court did not abuse its discretion nor prejudicially misapply the law in rendering its rulings.

DISPOSITION

Summary judgment is affirmed. The request for judicial notice is denied. Costs are awarded to respondent.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.